

Text – revised to address a comment

Text – pending

This document reflects discussion/notes/revisions from 10-15-14 CAG meeting.

## CHAPTER 210

### VIRGINIA WATER PROTECTION PERMIT PROGRAM REGULATION

#### Part I

#### VWP Permit Program Definitions, Exclusions, Prohibitions and Requirements

#### **9VAC25-210-10. Definitions.**

Unless a different meaning is required by the context, the following terms as used in this chapter shall have the following meanings. Definitions specific to surface water withdrawals are in 9VAC25-210-(tbd).

"Act" or "Clean Water Act" means 33 USC § 1251 et seq. as amended 1987.

"Adjacent" means bordering, contiguous or neighboring; wetlands separated from other surface water by man-made dikes or barriers, natural river berms, sand dunes and the like are adjacent wetlands.

"Administrative withdrawal" means a decision by the board permanently discontinuing the review or processing of a VWP permit application or request to modify a VWP permit.

"Applicant" means a person applying for a VWP individual permit or VWP general permit authorization.

"Aquatic environment" means surface waters and the habitat they provide, including both plant and animal communities.

"Avoidance" means not taking or modifying a proposed action or parts of an action so that there is no adverse impact to the aquatic environment.

"Beneficial use" means both instream and offstream uses. Instream beneficial uses include, but are not limited to, the protection of fish and wildlife resources and habitat, maintenance of waste assimilation, recreation, navigation, and cultural and aesthetic values. The preservation of instream flows for purposes of the protection of navigation, maintenance of waste assimilation capacity, the protection of fish and wildlife resources and habitat, recreation, cultural and aesthetic values is an instream beneficial use of Virginia's waters. Offstream beneficial uses include, but are not limited to, domestic (including public water supply), agricultural uses, electric power generation, commercial, and industrial uses.

"Best management practices (BMPs)" means a schedule of activities, prohibition of practices, maintenance procedures and other management practices that prevent or reduce the pollution of surface waters.

"Board or board" means the State Water Control Board.

"Channelization" means the alteration of a stream channel by widening, deepening, straightening, cleaning, or paving certain areas.

"Compensation" or "compensatory mitigation" means actions taken that provide some form of substitute aquatic resource for the impacted aquatic resource. [vdot proposal:

"Compensation" or "compensatory mitigation" means actions taken that offsets loss of functions or values for the impacted aquatic resource. Compensation may include[?,but is not limited to,] out-of-kind strategies with water quality benefits, habitat value or other, desirable characteristics.] [does this define out-of-kind more so than all comp?]

"Conversion" means those impacts to surface waters that permanently change an existing wetland type to a different wetland type.

"Creation" means the establishment of a wetland or other aquatic resource where one did not formerly exist.

"Cross-sectional drawing" means a scaled graph or plot that represents the plane made by cutting across an object at right angles to its length of ground elevation across a waterbody or a portion of it, usually along a line perpendicular to the waterbody or direction of flow. For purposes of this regulation, objects may include, but are not limited to, a surface waterbody or a portion of it, a man-made channel, an above-ground structure, a below-ground structure, a geographical feature, or the ground surface itself.

"Director" means the Director of the Department of Environmental Quality (DEQ) or an authorized representative.

"Discharge" means, when used without qualification, a discharge of a pollutant, or any addition of any pollutant or combination of pollutants, to state waters.

"Draft VWP permit" means a document indicating the board's tentative decision relative to a VWP permit action.

"Draining" means human-induced activities such as ditching, excavation, installation of tile drains, hydrologic modification by surface water runoff diversion, pumping water from wells, or similar activities such that the activities have the effect of artificially dewatering the wetland or altering its hydroperiod.

"Dredged material" means material that is excavated or dredged from beneath the surface of the water.

"Dredging" means a form of excavation in which material is removed or relocated from beneath the surface of the water.

"Ecologically preferable" means capable of providing a higher likelihood of replacing existing wetland or stream functions and values, water quality and fish and wildlife resources than alternative proposals.

"Enhancement" means activities conducted in existing wetlands or other portions of the aquatic environment that increase one or more aquatic functions or values.

"Excavate" or "excavation" means ditching, dredging, or mechanized removal of earth, soil, or rock.

"Fill" means replacing portions of surface water with upland, or changing the bottom elevation of a surface water for any purpose, by placement of any pollutant or material including but not limited to rock, sand, earth, and man-made materials and debris.

"Fill material" means any pollutant which replaces portions of surface water with dry land or which changes the bottom elevation of a surface water for any purpose.

"General permit" means a permit authorizing a specified category of activities.

"Impacts" means those activities specified in § 62.1-44.15:20 A of the Code of Virginia.

"Impairment" means the damage, loss or degradation of the functions of state waters.  
[suggestion made that if the phrase isn't problematic, don't change it - global]

"In-lieu fee fund" means a monetary fund operated by a nonprofit organization or governmental agency which receives financial contributions from persons impacting wetlands or streams pursuant to an authorized permitted activity and which expends the moneys received to provide consolidated compensatory mitigation for permitted wetland or stream impacts.

"Isolated wetlands of minimal ecological value (IWOMEV)" means those wetlands that: (i) do not have a surface water connection to other state waters; (ii) are less than one-tenth of an acre (0.10 acre or 4,356 square feet) in size; (iii) are not located in a Federal Emergency Management Agency designated 100-year floodplain; (iv) are not identified by the Virginia Natural Heritage Program as a rare or state significant natural community; (v) are not forested; and (vi) do not contain listed federal or state threatened or endangered species.

"Joint Permit Application (JPA)" means an application form that is used to apply for permits from the Norfolk District Army Corps of Engineers, the Virginia Marine Resources Commission, the Virginia Department of Environmental Quality, and local wetland boards for work in waters of the United States and in surface waters of Virginia.

"Law" means the State Water Control Law of Virginia.

"Legal name" means the full legal name of an individual, business, or other organization. For an individual, legal name means the first name, middle initial, last name, and suffix. For a [?an entity authorized to do business in Virginia business or other organization], the legal name means the exact name set forth in the entity's articles of incorporation, organization or trust, or formation agreement, as applicable.

"Minimization" means lessening impacts by reducing the degree or magnitude of the proposed action and its implementation.

"Mitigation" means sequentially avoiding and minimizing impacts to the maximum extent practicable, and then compensating for remaining unavoidable impacts of a proposed action.

"Mitigation bank" means a site providing off-site, consolidated compensatory mitigation that is developed and approved in accordance with all applicable federal and state laws or regulations for the establishment, use and operation of mitigation banks, and is operating under a signed banking agreement.

"Mitigation banking" means compensating for unavoidable wetland or stream losses in advance of development actions through the sale, purchase or use of credits from a mitigation bank.

"Multi-project mitigation site" means an area of wetland restoration, creation, enhancement and, in appropriate circumstances, preservation of wetlands or streams or upland buffers adjacent to wetlands or other state waters, that is or has been utilized to meet compensation requirements for more than one project but that is not a mitigation bank.

"Nationwide permit" means a general permit issued by the USACE under 40 CFR Part 241 and, except where suspended by individual USACE Corps Districts, applicable nationwide.

"Non-tidal wetland" means those wetlands other than tidal wetlands that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, as defined by the U.S. Environmental Protection Agency pursuant to § 404 of the federal Clean Water Act in 33 CFR 328.3(b). Wetlands generally include swamps, marshes, bogs, and similar areas.

"Normal agricultural activities" means those activities defined as an agricultural operation in § 3.2-300 of the Code of Virginia and any activity that is conducted as part of or in furtherance of such agricultural operation, but shall not include any activity for which a permit would have been required as of January 1, 1997, under 33 USC § 1344 or any regulations promulgated pursuant thereto.

"Normal residential gardening, lawn and landscape maintenance" means ongoing noncommercial residential activities conducted by or on behalf of an individual occupant, including mowing, planting, fertilizing, mulching, tilling, vegetation removal by hand or by hand tools, placement of decorative stone, fencing and play equipment. Other appurtenant noncommercial activities, provided that they do not result in the conversion of a wetland to upland or to a different wetland type, may also be included.

"Normal silvicultural activities" means any silvicultural activity as defined in § 10.1-1181.1 of the Code of Virginia, and any activity that is conducted as part of or in furtherance of such

silvicultural activity, but shall not include any activity for which a permit would have been required as of January 1, 1997, under 33 USC § 1344 or any regulations promulgated pursuant thereto.

"Open water" means an area that, during a year with normal patterns of precipitation, has standing water for sufficient duration to establish an ordinary high water mark. The term "open water" includes lakes and ponds but does not include ephemeral waters, stream beds, or wetlands.

"Ordinary high water mark" means a line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank; shelving; changes in the character of soil; ~~destruction of [terrestrial] vegetation; or the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.~~ [match the definition in Corps' regulations]

"Out-of-kind mitigation" means compensatory mitigation that does not replace the same type of wetland or surface water as was impacted, but does replace lost wetland or surface water functions, values, or beneficial uses.

"Permanent flooding or impounding" means a permanent increase in the duration or depth of standing water on a land surface, such as from a dam. Permanent increases in duration or depth of standing water that result from extended-detention basins and enhanced extended-detention basins, when designed, constructed, and maintained to function in accordance with Virginia Department of Conservation and Recreation (DCR) standards for such facilities (Virginia Stormwater Management Handbook, First Edition, 1999, Volume 1, Chapter 3), or when designed in accordance with local standards that, at a minimum, meet the DCR standards, are not considered to be permanent flooding and impounding.

"Permanent impacts" means those impacts to surface waters, including wetlands, that cause a permanent alteration of the physical, chemical, or biological properties of the surface waters, or of the functions and values of a wetland.

"Permittee" means the person who holds a VWP individual or general permit.

"Permittee-responsible compensation" means an aquatic resource restoration, establishment, enhancement, or preservation activity [vdot proposal: or other [?water quality or habitat improvement] activity] undertaken by the permittee to provide compensatory mitigation.

"Person" means an individual, corporation, partnership, association, governmental body, municipal corporation, or any other legal entity.

"Plan view sketch" means a scaled graph or plot that represents the view of an object as projected onto orthogonal planes. For purposes of this regulation, objects may include, but are not limited to, structures, contours, or boundaries.

"Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution.

"Pollution" means such alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters: (a) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (b) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (c) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (i) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (ii) the discharge of untreated sewage by any owner into



state waters; and (iii) contributing to the contravention of standards of water quality duly established by the board, are "pollution" for the terms and purposes of this chapter.

"Practicable" means available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes.

"Preservation" means the protection of resources in perpetuity through the implementation of appropriate legal and physical mechanisms.

"Profile sketch" means a scaled graph or plot that represents the side view of an object. For purposes of this regulation, objects may include, but are not limited to, a surface waterbody or a portion of it, a man-made channel, an above-ground structure, a below-ground structure, a geographical feature, or the ground surface itself.

"Public hearing" means a fact finding proceeding held to afford interested persons an opportunity to submit factual data, views and comments to the board pursuant to § 62.1-44.15:2 of the Code of Virginia.

"Regional permit" means a general permit issued by the USACE under 40 CFR Part 241 and applicable within a specified geographic area.

"Restoration" means the reestablishment of a wetland or other aquatic resource in an area where it previously existed. Wetland restoration means the reestablishment of wetland hydrology and vegetation in an area where a wetland previously existed. Stream restoration means the process of converting an unstable, altered or degraded stream corridor, including adjacent areas and floodplains, to its natural conditions.

"Riprap" means a layer of nonerodible material such as stone or chunks of concrete.

"Section 401" means § 401 of the Clean Water Act, or 33 USC § 1341, as amended in 1987.

"Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions.

"State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands.

"Surface water" means all state waters that are not ground water as defined in § 62.1-255 of the Code of Virginia.

"Suspend" or "suspension" means a decision by the board or applicant ~~stopping~~ suspending the review or processing of a permit application or request to modify a permit or permit authorization until such time that information requested by the board is provided, reviewed, and deemed adequate to allow the review or processing of an application or request for modification to continue.

"Temporary impacts" means impacts to wetlands or other surface waters that ~~cumulatively~~ do not cause a permanent alteration of the physical, chemical, or biological properties of surface waters or the ~~permanent~~ alteration or degradation of existing wetland acreage or functions. Temporary impacts include activities in which the impact area is restored to its preconstruction contours and elevations, such that previous ~~acreage and functions~~ are restored. [cbf proposal: ~~acreage limit should be added – group did not think acreage appropriate for definition but rather in reg text re: limits, etc~~]

"Tidal wetland" means vegetated and nonvegetated wetlands as defined in § [28.2-1300](#) of the Code of Virginia.

"Toxic pollutant" means any agent or material including, but not limited to, those listed under § 307(a) of the Water Pollution Prevention and Control Act (33 USC § 1317(a)), which after

discharge will, on the basis of available information, cause toxicity. Toxicity means the inherent potential or capacity of a material to cause adverse effects in a living organism, including acute or chronic effects to aquatic life, detrimental effects on human health or other adverse environmental effects.

"Undesirable plant species" means any species that invades, naturally colonizes, or otherwise dominates a compensatory mitigation site or mitigation bank and may cause or contribute to the failure of the vegetative success criteria for a particular compensatory mitigation site or mitigation bank.

"VWP general permit" means a regulation that constitutes a VWP permit for a category of activities.

"VWP permit" means an individual or general permit issued by the board under § 62.1-44.15:20 of the Code of Virginia that authorizes activities otherwise unlawful under § 62.1-44.5 of the Code of Virginia or otherwise serves as the Commonwealth of Virginia's § 401 certification.

"Water quality standards" means water quality standards adopted by the board and approved by the administrator of the United States Environmental Protection Agency under § 303 of the Clean Water Act as defined at 9VAC25-260.

"Watershed approach" means an analytical process for making compensatory mitigation decisions that support the sustainability or improvement of aquatic resources in a watershed and that ensures authorized impacts and mitigation have been considered on a watershed scale.

"Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support,

a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

#### Statutory Authority

§§ 62.1-44.5 and 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act.

#### Historical Notes

Derived from VR680-15-02 § 1.1, eff. May 20, 1992; amended, Virginia Register Volume 16, Issue 25, eff. September 27, 2000; Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 24, Issue 9, eff. February 6, 2008; Volume 25, Issue 5, eff. December 10, 2008.

#### **9VAC25-210-20 to 9VAC25-210-40. [Repealed]**

#### Historical Notes

Derived from VR680-15-02 §§ 1.2 to 1.4, eff. May 20, 1992; repealed, Virginia Register Volume 17, Issue 21, eff. August 1, 2001.

#### **9VAC25-210-45. Surface waters delineations.**

A. Wetlands. Each wetland delineation **[including those for isolated wetlands,]** shall be conducted in accordance with the United States Army Corps of Engineers (USACE) "Wetland Delineation Manual, Technical Report Y-87-1, January 1987, Final Report" (Federal Manual) and **any regional wetland supplements approved for use by USACE**. These Federal Manuals shall be interpreted in a manner consistent with USACE guidance and the requirements of this regulation, and any delineation guidance adopted by the board as necessary to ensure consistency with the USACE implementation of delineation practices. **USACE regulatory guidance letters or DEQ policy or guidance may be used to supplement preparation of wetlands delineations.**

B. Other surface waters. Delineations for surface waters other than wetlands may be conducted in accordance with USACE or DEQ policy or USACE or DEQ guidance and shall take into consideration the location of an ordinary high water mark, if applicable. Other surface waters include, but are not limited to, ~~isolated wetlands~~, [certain [?or jurisdictional]ditches], streams, open water, or areas of submerged aquatic vegetation. [?do we need last sentence][?would deq regulate ditches other than those regulated by corps][state which ditches are regulated by deq] [most leaning toward deleting last sentence]

Statutory Authority

§ 62.1-44.15 of the Code of Virginia.

Historical Notes

Derived from Virginia Register Volume 17, Issue 21, eff. August 1, 2001.

**9VAC25-210-50. Prohibitions and requirements for VWP permits.**

A. Except in compliance with a VWP permit, unless the activity is otherwise exempted or excluded, no person shall dredge, fill or discharge any pollutant into, or adjacent to surface waters; withdraw surface water; otherwise alter the physical, chemical or biological properties of state waters and make them detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses; excavate in wetlands; or on or after October 1, 2001, conduct the following activities in a wetland:

1. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions;
2. Filling or dumping;
3. Permanent flooding or impounding; or

4. New activities that cause significant alteration or degradation of existing wetland acreage or functions.

B. No VWP permit shall be issued for the following:

1. Where the proposed activity or the terms or conditions of the VWP permit do not comply with state law or regulations including but not limited to § 10.1-1408.5 of the Code of Virginia;

2. For the discharge of any radiological, chemical or biological warfare agent or high level radioactive material into surface waters.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act.

Historical Notes

Derived from VR680-15-02 § 1.5, eff. May 20, 1992; amended, Virginia Register Volume 16, Issue 25, eff. September 27, 2000; Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 25, Issue 5, eff. December 10, 2008.

**9VAC25-210-55. Statewide information requirements.**

The board may request, and any owner shall provide if requested, any pertinent information as may be necessary to determine the effect of his discharge on the quality of state waters, or such other information as may be necessary to accomplish the purposes of this chapter.

Statutory Authority

**§ 62.1-44.21 of the Code of Virginia.9VAC25-210-60. Exclusions.**

A. The following activities do not require a VWP permit but may require other permits under state and federal law. Upon request by the board, any person claiming one of these exclusions shall demonstrate to the satisfaction of the board that they qualify or she qualifies for the

exclusion. Exclusions pertaining to surface water withdrawals are established in 9VAC25-210- (tbd).

1. Discharges of dredged or fill material into state waters, excepting wetlands, which are addressed under a USACE Regional, General or Nationwide Permit, and for which no § 401 Water Quality Certificate is required.
2. Any discharge of stormwater from municipal separate storm sewer systems or land disturbing activities authorized in accordance with 9 VAC 25-870, or the discharge of sewage, industrial wastes, other wastes or any noxious or deleterious substances into surface waters that is authorized by a Virginia Pollutant Discharge Elimination System (VPDES) permit in accordance with 9VAC25-31 or a Virginia Pollution Abatement (VPA) permit in accordance with 9VAC25-32.
3. Any activity governed under Chapter 13 of Title 28.2 of the Code of Virginia, unless state certification is required by § 401 of the Clean Water Act. State certification is waived if the activity meets the provisions of subdivision 10 a of this subsection. The activity does not require a VWP permit pursuant to § 62.1-44.15:21 H of the Code of Virginia.
4. Normal residential gardening, lawn and landscape maintenance in a wetland, or other similar activity that is incidental to an occupant's ongoing residential use of property, and that is of minimal ecological impact. The criteria governing this exclusion are described in Section 10 of this chapter.
5. Maintenance, including emergency reconstruction of recently damaged parts of currently serviceable structures, such as dikes, groins, levees, dams, riprap breakwaters, causeways, bridge abutments or approaches, and transportation, and purpose-built stormwater and utility structures. Maintenance does not include modifications that change the character, scope, or size [or impacts – ?delete; impacts viewed by some as being

included in character, scope and size] of the original design. In order to qualify for this exclusion, emergency reconstruction shall occur ~~within a reasonable period of time as soon as practicable~~ after damage occurs. [practicable may include costs to some][perhaps deadline needed][practicable is defined in reg] [should maintenance be separated from emergency reconstruction][nwp3 allows up to 2 yrs to repair] – leaning toward using suggested language

6. Impacts to open waters that do not have a detrimental effect on public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, recreation or other uses. [cbf suggestion: Impacts to open waters that do not alter the physical, chemical, or biological properties of state waters or have a detrimental effect on public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, recreation or other uses.]

7. Flooding or back-flooding impacts to surface waters resulting from the construction of temporary sedimentation basins on a construction site, when such structures are necessary for erosion and sediment control or stormwater management purposes. The term "construction site" means the site where any land-disturbing activity is physically located or conducted for the purpose of erection of buildings, roads, and utilities and other discrete structures, and includes the locations of on-site or off-site project-specific support activities (for example, concrete or asphalt batch plants, equipment staging yards, material storage areas, excavated material disposal areas, or borrow areas). [put definition in -10 instead][use same definition as in stmrw regs 9vac25-880-1][need to revisit what's included to cover things like recreational facilities] – leaning to putting in definition section and making match stmrwtr



8. Normal agriculture and silviculture activities in a wetland such as plowing, seeding, cultivating, minor drainage and harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices.

a. To fall under this exclusion, the activities specified in subdivision 8 of this section must be part of an established (i.e., ongoing) agriculture or silviculture operation, and must be in accordance with applicable best management practices set forth in either Forestry Best Management Practices for Water Quality in Virginia Technical Guide (Fourth Edition, July 2002) or Virginia Agricultural BMP Manual (2000), which facilitate compliance with the § 404(b)(1) Guidelines (40 CFR Part 230). Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation.

b. Activities which bring a new area into agricultural or silvicultural use are not part of an established operation. An operation ceases to be established when the area in which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operation. If the activity takes place outside surface waters, it does not need a VWP permit, whether or not it is part of an established agriculture or silviculture operation.

c. For the purposes of subdivision 8 of this section, cultivating, harvesting, minor drainage, plowing, and seeding are defined as follows:

(1) "Cultivating" means physical methods of soil treatment employed within established agriculture and silviculture lands on farm or forest crops to aid and improve their growth, quality, or yield.

(2) "Harvesting" means physical measures employed directly upon farm, forest, or crops within established agricultural and silviculture lands to bring about their removal from farm or forest land, but does not include the construction of farm or forest roads.

(3) "Minor drainage" means:

- (a) The discharge of dredged or fill material incidental to connecting upland drainage facilities to surface waters, adequate to effect the removal of excess soil moisture from upland croplands. Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops;
- (b) The discharge of dredged or fill material for the purpose of installing ditching or other water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, or other wetland crop species, where these activities and the discharge occur in surface waters which are in established use for such agricultural and silviculture wetland crop production;
- (c) The discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of the Act, and which are in established use for the production of rice, or other wetland crop species;
- (d) The discharge of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding, harvesting or cultivating of crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the

blockage. Removal must be accomplished within one year after such blockages are discovered in order to be eligible for exclusion; and

(e) Minor drainage in surface waters is limited to drainage within areas that are part of an established agriculture or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a nonwetland (for example, wetland species to upland species not typically adapted to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to agriculture). In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting surface water. Any discharge of dredged or fill material into surface water incidental to the construction of any such structure or waterway requires a VWP permit, unless otherwise excluded or exempted by this regulation.

(4) "Plowing" means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, disking, harrowing, and similar physical means used on farm or forest land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. Plowing does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of surface water to dry land. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities does not constitute plowing. Plowing as described above will never involve a discharge of dredged or fill material.

(5) "Seeding" means the sowing of seed and placement of seedlings to produce farm or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

9. Discharges of dredged or fill material into wetlands when addressed under a USACE Regional, General, or Nationwide Permit and that meet the provisions of subdivision 10 a of this subsection.

10. Construction or maintenance of farm ponds or impoundments, stock ponds or impoundments, or irrigation ditches, or the maintenance (but not construction) of drainage ditches.

a. The exclusion for the construction and maintenance of farm or stock ponds and farm or stock impoundments applies to those structures that are operated for normal agricultural or silvicultural purposes, and are less than 25 feet in height or create a maximum impoundment capacity smaller than 100 acre-feet.

b. The exclusion for the construction and maintenance of farm or stock ponds and farm or stock impoundments does not include the impacts associated with the withdrawal of surface water from, within, or behind such structures. A VWP permit may be required for the surface water withdrawal.

c. Discharge associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exclusion.

d. The maintenance dredging of existing ditches is included in this exclusion provided that the final dimensions of the maintained ditch do not exceed the average dimensions of the original ditch. This exclusion does not apply to the construction of new ditches or to the channelization of streams.

11. Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with applicable best management practices (BMPs) set forth in either Forestry Best Management Practices for Water Quality in Virginia, Technical Guide, Fourth Edition, July 2002, or Virginia Agricultural BMP Manual, 2000, to ensure that flow and circulation patterns and chemical and biological characteristics of surface waters are not impaired, that the reach of such waters is not reduced, and that any adverse effect on the aquatic environment will otherwise be minimized. The BMPs which must be applied to satisfy this provision include the following baseline provisions:

- a. Permanent roads (for agriculture or forestry activities), temporary access roads (for mining, forestry, or farm purposes), and skid trails (for logging) in surface waters shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific agriculture, silviculture or mining operations, and local topographic and climatic conditions;
- b. All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize discharges of dredged or fill material into surface waters;
- c. The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows;
- d. The fill shall be properly stabilized and maintained to prevent erosion during and following construction;
- e. Discharges of dredged or fill material into surface waters to construct road fill shall be made in a manner which minimizes the encroachment of trucks, tractors,

bulldozers, or other heavy equipment within state waters (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;

f. In designing, constructing, and maintaining roads, vegetative disturbance in surface waters shall be kept to a minimum;

g. The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;

h. Borrow material shall be taken from upland sources whenever feasible;

i. The discharge shall not take, or jeopardize the continued existence of a state- or federally-listed threatened or endangered species as defined under the Endangered Species Act (16 USC § 1531 et seq.), in § 29.1-566 of the Code of Virginia and in 4VAC15-20-130 B and C, except as provided in § 29.1-568 of the Code of Virginia, or adversely modify or destroy the critical habitat of such species;

j. Discharges into the nesting and breeding areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical alternatives exist;

k. The discharge shall not be located in proximity of a public water supply or intake;

l. The discharge shall not occur in areas of concentrated shellfish production;

m. The discharge shall not occur in a component to the National Wild and Scenic River System;

n. The discharge material shall consist of suitable material free from toxic pollutants in toxic amounts; and

o. All temporary fills shall be removed in their entirety and the area restored to its original elevation. Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act.

## Historical Notes

Derived from VR680-15-02 § 1.6, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 24, Issue 9, eff. February 6, 2008; Volume 25, Issue 5, eff. December 10, 2008.

**9VAC25-210-65. Continuation of expiring permits.**

Where the permittee has submitted a timely and complete application and where, through no fault of the permittee, the board does not issue or issue with conditions a new VWP permit or the board does not provide notice of its tentative decision to deny the application before the existing VWP permit expires, the conditions of the expiring VWP permit may be administratively continued in full force and effect until the effective date of a new permit. [link timely with the x days before language elsewhere in reg]

## Statutory Authority

§ 62.1-44.15 of the Code of Virginia.

**9VAC25-210-70. Effect of a VWP permit.**

A. As to the permitted activity, compliance with a VWP permit constitutes compliance with the VWP permit requirements of the Law and regulations.

B. The issuance of a VWP permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize injury to private property or any invasion of personal rights or any infringement of federal, state or local law or regulation.

## Statutory Authority

§ 62.1-44.15 of the Code of Virginia.

## Historical Notes

Derived from VR680-15-02 § 1.7, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001.

## Part II

## VWP Permit Application and Development

9VAC25-210-75. (Repealed.)Historical Notes

**Derived from Virginia Register Volume 23, Issue 21, eff. July 25, 2007.9VAC25-210-80.  
Application for a VWP permit.**

A. Application for a VWP Permit. Any person who is required to obtain a VWP permit, except those persons applying for an emergency VWP permit for a public water supply emergency, shall submit a complete VWP permit application to DEQ through the most current Joint Permit Application procedures, as established within each type of Joint Permit Application (JPA). The Virginia Department of Transportation (VDOT) may use its monthly Interagency Coordination Meeting (IACM) process for submitting JPAs. There shall be no commencement of any activity subject to the VWP permit program regulation prior to the issuance of a VWP permit or VWP general permit authorization.

B. Informational requirements for all VWP individual permit applications are identified in this subsection with the exception of applications for emergency VWP permits to address a public water supply emergency, for which the information required in 9VAC25-210-(tbd) shall be submitted. In addition to the information in this sub-section, applications involving a surface water withdrawal or a Federal Energy Regulatory Commission (FERC) license or re-license **associated with a surface water withdrawal** shall also submit the information required in 9VAC25-210-(tbd). The board may request additional information as needed to evaluate compliance with this chapter.

1. A complete VWP individual permit application, at a minimum, consists of the following information:

a. Legal name, mailing address, telephone number, and if applicable, electronic mail address and fax number of applicant.



- b. If different from applicant, legal name, mailing address, telephone number, and if applicable, electronic mail address and fax number of property owner.
- c. If applicable, name of authorized agent, mailing address, telephone number, and if applicable, fax number and electronic mail address.
- d. Project name and proposed development and construction schedule. This schedule will be used to determine the VWP permit term.
- e. The following information for the project site location, and any related permittee-responsible compensatory mitigation site, if applicable:

- (1) The physical street address, nearest street, or nearest route number; city or county; zip code; and, if applicable, parcel number of the site(s).

- (2) Name of the impacted waterbody or waterbodies, or receiving waters, as applicable, at the site(s).

- (3) The latitude and longitude (to the nearest second) at the center of the site(s).

- (4) The fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, for the site(s).

- (5) A detailed map depicting the location of the site(s), including the project boundary ~~all surface waters, and all preservation areas on the site(s)~~. The map (for example, a United States Geologic Survey topographic quadrangle map) should be of sufficient detail to easily locate the site(s) for inspection.

- (6) GIS-compatible shapefile(s) [?if available] of the project boundary and all existing preservation areas on the site(s)[, in accordance with DEQ guidance,] unless otherwise approved by or coordinated with DEQ. [Each GIS-compatible shapefile shall: i) contain a minimum of two (2) coordinate pairs (grid ticks or property corners); ii) be projected using the Virginia State Plane Coordinate System (NAD 1983), North

~~or South Zone, as appropriate, in the units of United States Feet; iii) contain a projections file (file extension .prj); and iv) consist of closed polygons with attribute data. The GIS data shall be based upon the surveyed boundary, conducted by a licensed land surveyor or a licensed professional engineer using traditional surveying procedures, and have a horizontal accuracy of within +/- 0.2 (0.25) feet of the surveyed boundary.~~

[keep requirement for shapefile but remove the specific criteria, which could be put in guidance in more detail] [make this a deq-waivable reqmt]f. A complete narrative description of the project, including project purpose and need.

g. An alternatives analysis for the proposed project detailing the measures taken during project design and development to first avoid and then minimize impacts to surface waters to the maximum extent practicable in accordance with the Guideline for Specification of Disposal Sites for Dredged or Fill Material, 40 CFR Part 230 (Federal Register, December 24, 1980). Avoidance and minimization includes, but is not limited to, stepsmeasures taken to reduce the size, scope, configuration, or density of the proposed project, including review of alternative sites where required for the project, which would avoid or result in less adverse impact to surface waters, and documentation demonstrating the reason the applicant determined less damaging alternatives are not practicable. ~~in accordance with the Guideline for Specification of Disposal Sites for Dredged or Fill Material, 40 CFR Part 230 (Federal Register, December 24, 1980) to first avoid then minimize adverse impacts to surface waters to the maximum extent practicable.~~ The analysis shall demonstrate to the satisfaction of the board that avoidance and minimization opportunities have been identified and applied to the proposed activity and that the proposed activity in terms of impacts to state waters and fish and wildlife resources is the least environmentally damaging practicable alternative. ~~The avoidance and minimization analysis shall include, but will~~

~~not be limited to, documentation of steps taken or evaluated to reduce the size, scope, configuration, or density of the proposed project, including review of alternative sites where required for the project, which would avoid or result in less adverse impact to surface waters, and documentation demonstrating the reason the applicant determined less damaging alternatives are not practicable.~~

h. A narrative description of all impacts proposed to surface waters, including the type of activity to be conducted in surface waters, any physical alteration to surface waters, and all surface water impacts associated with the project. Surface water impacts shall be identified as follows:

(1) Wetland impacts quantified by type in acres [to the hundredths decimal place] or square feet (rounded to the nearest whole number) and identified according to their Cowardin classification.[make this edit to each below] [look at jpa to see if it specifies decimals or rounding]

(2) Stream impacts quantified in linear feet and square feet to the hundredths decimal place; identified according to their Cowardin classification; and when compensation is required, assessed using the Unified Stream Methodology [or most current accepted DEQ stream assessment methodology]. [cannot reference in reg something that doesn't exist yet – check with cindy]

(3) Open water impacts identified and quantified by type in acres or square feet or acres to the hundredths decimal place.

(4) A copy of the preliminary or approved jurisdictional determination, if available, or the preliminary jurisdictional determination from the United States Army Corps of Engineers (USACE), United States Department of Agriculture Natural Resources Conservation Service (NRCS), or DEQ, or other correspondence from the USACE, NRCS, or DEQ indicating approval of the boundary of applicable

jurisdictional surface waters, including wetlands data sheets if applicable, and the latitude and longitude (to the nearest second) of the center of the project site. ~~[A determination or other correspondence provided by one agency shall not automatically convey approval by any other agency. (delete last sentence)]~~

(5) A delineation map, and GIS-compatible shapefile(s) of the delineation map, that: depicts the geographic area(s) of all delineated and approved surface water boundaries in accordance with 9VAC25-210-45; describes such areas in accordance with subsections B 1 h (1) through B 1 h (3) of this section; and quantifies and describes any other surface waters, according to their Cowardin classification or similar terminology, if applicable. The GIS-compatible shapefile(s) shall follow the specifications described in subsection B 1 e (6) of this section.

The requirement for a delineation map may be waived by DEQ on a case-by-case basis. ~~[see above comments]~~

i. Plan view drawing(s) of the project site sufficient to assess the project, including at a minimum the following:

(1) North arrow, graphic scale, existing and proposed contours.

(2) Limits of proposed impacts to surface waters.

(3) Location of all existing and proposed structures.

(4) All delineated wetlands and all jurisdictional surface waters on the site, including the Cowardin classification for those surface waters and waterway name (if designated); ebb and flood or direction of flow; ordinary high water mark in nontidal areas; and mean low water and mean high water lines in tidal areas.

(5) The limits of any Chesapeake Bay Resource Protection Areas (RPAs), unless exempt from the Chesapeake Bay Preservation Act.

- (6) The limits of any areas that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (protected areas).
- j. Cross-sectional drawing(s) of each proposed impact area, which include, at a minimum, ~~north arrow~~, graphic scale, existing structures, existing and proposed ~~contour elevations~~, limit of surface water areas, ~~ebb and flood or direction of flow (if applicable)~~, ordinary high water mark in nontidal areas, mean low water and mean high water lines in tidal areas, impact limits, and location of all existing and proposed structures. Profile drawing(s) with the above information may be required on a case-by-case basis to demonstrate minimization of impacts.
- k. Materials assessment. If dredged material from on-site areas is involved, the applicant must provide evidence or certification that the material is free from toxic contaminants prior to disposal, or that the material, if not free of contaminants, will be placed in an approved disposal area. If applicable, the applicant may be required to conduct grain size and composition analyses, tests for specific parameters or chemical constituents, or elutriate tests on the dredge material.
- l. An assessment of potential impacts to federally-listed and state-listed threatened or endangered species, including any correspondence or documentation from federal or state resource agencies addressing potential impacts to listed species.
- m. A compensatory mitigation plan to achieve no net loss of wetland acreage and functions or stream functions and water quality benefits.
- (1) If permittee-responsible compensation ~~for wetland impacts [should allow out of kind]~~ is proposed, a conceptual wetland compensatory mitigation plan must be submitted in order for an application to be deemed complete and shall include at a minimum: the goals and objectives in terms of replacement of wetland acreage

and functions; a detailed location map including latitude and longitude (to the nearest second) and the fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, at the center of the site; a description of the surrounding land use; a hydrologic analysis including a draft water budget for non-tidal areas based on expected monthly inputs and outputs which will project water level elevations for a typical year, a dry year and a wet year; groundwater elevation data, if available, or the proposed location of groundwater monitoring wells to collect these data; wetland delineation confirmation and data sheets and maps for existing surface water areas on the proposed site(s); a conceptual grading plan; a conceptual planting scheme including suggested plant species and zonation of each vegetation type proposed; a description of existing soils including general information on both topsoil and subsoil conditions, permeability, and the need for soil amendments; a draft design of any water control structures; inclusion of buffer areas; and a description of any structures and features necessary for the success of the site; the schedule for compensatory mitigation site construction; and proposed language for protecting the compensation site or sites, including all surface waters and buffer areas within its boundaries, in perpetuity in accordance with subsection B 1 m (4) of this section section measures for the control of undesirable species.

(2) If permittee-responsible compensation for stream impacts [same comment as in wetlands paragraph] is proposed, a conceptual stream compensatory mitigation plan must be submitted in order for an application to be deemed complete, and shall include at a minimum: the goals and objectives in terms of water quality benefits and replacement of stream functions; a detailed location map including the latitude and longitude (to the nearest second) and the fourth order subbasin,

as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, at the center of the site; a description of the surrounding land use; the proposed stream segment restoration locations including plan view and cross-section drawings; the stream deficiencies that need to be addressed; data obtained from a DEQ-approved, stream impact assessment methodology such as the Unified Stream Methodology; the proposed restoration measures to be employed including channel measurements, proposed design flows, types of instream structures, and conceptual planting scheme; reference stream data, if available; inclusion of buffer areas; schedule for restoration activities; and proposed language for protecting the compensation site or sites, including all surface waters and buffer areas within its boundaries, in perpetuity in accordance with subsection B 1 m (4) of this section measures for the control of undesirable species.

(3) For permittee-responsible compensation, the permittee shall provide protection in perpetuity of compensatory mitigation areas in accordance with 9VAC25-210-116 B 3 [prior to commencing the activities [needed, do not delete]] authorized by the VWP permit or permit authorization.

(a) For the purposes of a complete application, the permittee shall describe the intended protection mechanism(s). [cbf proposal: list mechanisms] Proof of recordation of the mechanisms, or similar proof that the mechanisms are initiated, shall be submitted to DEQ in accordance with the approved final compensatory mitigation plan. [ , such as but not limited to, x,y,z]

(b) If approved by DEQ, the long-term protection for permittee-responsible compensation on government property may be provided through federal facility management plans, or integrated natural resources management plans, or

other alternate management plans submitted by a government agency or public authority. In cases where an alternate mechanism of long-term management is submitted for DEQ approval (e.g., a documented commitment from a government agency or public authority), financial assurances will not be necessary for that permittee-responsible compensation on government property. [comment made that financial assurances not req'd for others – suggestion based on Rule] [the financial assurance piece may be better located in final plan section]

- (c) The mechanism for protection shall include the following minimum restrictions: no ditching, land clearing, or discharge of dredge or fill material, and no activity in the area designated as compensation area with the exception of maintenance; corrective action measures; or DEQ-approved activities described in the approved final compensatory mitigation plan or long-term management plan.
- (d) The mechanism of protection shall include a provision for access to the site from a public road. [issues raised about use of public road and extension of easements]
- (e) The mechanism of protection shall be recorded in the chain of title to the property or an equivalent instrument for government-owned lands in accordance with 9VAC25-210-116 F 1 and F 2.
- (4) Compensation for open water impacts may be required, as appropriate, to protect state waters and fish and wildlife resources from significant impairment.
- (5) Any compensatory mitigation plan proposing the purchase or use of mitigation banking or in-lieu fee fund credits shall include:
  - (a) The name of the proposed mitigation bank or in-lieu fee fund;



(b) The number and type of credits proposed to be purchased or used;

(c) A copy of the bank's or in-lieu fee fund site's service area map with the impact site indicated; and

(d) Documentation from the bank or in-lieu fee fund sponsor of the availability of credits at the time of application.

n. A written ~~disclosure~~ description and a graphical depiction identifying all upland areas including buffers, wetlands, open water, other surface waters, and compensation areas, located within the proposed project boundary or permittee-responsible compensation areas, that are under a deed restriction, conservation easement, restrictive covenant, or other land use protective instrument (protected areas). Such ~~disclosure~~ description and a graphical depiction shall include the nature of the prohibited activities within the protected areas and the limits of any Chesapeake Bay Resource Protection Areas (RPAs), [unless proposed impact is an exempt use under the ~~Chesapeake Bay Preservation Act~~] as additional state or local requirements may apply if the project is located within an RPA.

o. Information for all riparian landowners located within one-half mile downstream from each proposed impact area in non-tidal areas and one-quarter mile upstream and downstream in tidal areas, and for all landowners located adjacent to proposed impact areas. The information must include, at a minimum, the following: Property owner's name, mailing address (street name, city, state and zip code), property parcel number(s) used by the locality, and a map depicting those property parcels. [consider adding waiver for this reqmt for state agencies]

p. Signature page that has been signed and dated by the applicant. If the applicant is a business or other organization, the signature must be made by an individual with the authority to bind the business or organization, and the title of the signatory must be

provided. The application signature page, either on the copy submitted to VMRC or to DEQ, must have an original signature. Electronic submittals containing the original-signature page, such as that contained in a scanned document file, are acceptable.

q. Application processing fee. The applicant will be notified by the board as to the appropriate fee for the project in accordance with 9VAC25-20. The fee must be received prior to release of a draft VWP permit.

C.

An analysis of the functions [?and values] of wetlands proposed to be impacted may be required by DEQ. When required, the method selected for the analysis shall assess water quality [and/or] habitat metrics and shall be approved by DEQ for use in advance of conducting the analysis. [comment made to include what methods deq wants, such as VIMS for nontidal waters across state] [comment also for deq to use the assessment results][noted staff training needed on methods] [comment made to delete the reqmt for func assmt]

1. No analysis shall be required when wetland impacts being considered under a VWP individual permit or general permit authorization total 1.00 acre or less.

2. Analysis shall be required when wetland impacts being considered under a VWP individual permit or general permit authorization total 1.01 acres or more and when any of the following applies:

a. Proposed compensatory mitigation consists of permittee-responsible compensation.

- b. Proposed compensatory mitigation consists of mitigation bank or in-lieu fee fund credits at less than the standard mitigation ratios of 2:1 forest, 1.5:1 scrub-shrub, and 1:1 emergent.
- c. Impacted wetlands are underlain by histosols.
- d. Impacted wetlands are composed of 10% or more, singularly or in combination based upon either basal area or percent areal cover in the area of impact, in a vegetative stratum: Atlantic white cedar (*Chamaecyparis thyoides*), bald cypress (*Taxodium distichum*), water tupelo (*Nyssa aquatica*), or overcup oak (*Quercus lyrata*).
- e. Proposed out-of-kind compensatory mitigation that includes emergent wetlands as replacement for forested wetlands or that includes water quality enhancements as replacement for wetlands.

C. Additional information. The board may require additional information if needed to evaluate compliance with this chapter.

D. Incomplete application. Where an application is not accepted as complete by the board within 15 days of receipt, the board shall require the submission of additional information from the applicant and may suspend processing of any application until such time as the applicant has supplied the requested information and the board considers the application complete. Where the applicant becomes aware that he omitted one or more relevant facts from a VWP permit application or submitted incorrect information in a VWP permit application or in any report to the board, the applicant shall immediately submit such facts or the correct information. A revised application with new information shall be deemed a new application for purpose of reviews but shall not require an additional notice or an additional permit application fee. An incomplete permit application may be administratively withdrawn from processing by the board for failure to provide the required information after 60 days from the date of the latest written

information request made by the board. An applicant may request a suspension of application review by the board ~~during any 15-day completeness~~ review period. ~~Failure~~Submission by the applicant ~~to make~~making such a request shall not preclude the board from administratively withdrawing an incomplete application. Resubmittal of a permit application for the same or similar project, after such time that the original permit application was administratively withdrawn, shall require submittal of an additional permit application fee.

#### Statutory Authority

§ 62.1-44.15 of the Code of Virginia.

#### Historical Notes

Derived from VR680-15-02 § 2.1, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007.

#### **9VAC25-210-90. Conditions applicable to all VWP permits.**

A. Duty to comply. The permittee shall comply with all conditions of the VWP permit. Nothing in this chapter shall be construed to relieve the permittee of the duty to comply with all applicable federal and state statutes, regulations and prohibitions. Any VWP permit violation is a violation of the law, and is grounds for enforcement action, VWP permit termination, revocation, modification, or denial of an application for a VWP permit extension or reissuance.

B. Duty to cease or confine activity. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the activity for which a VWP permit has been granted in order to maintain compliance with the conditions of the VWP permit. If the permittee wishes to continue an activity regulated by the permit after the expiration date of the permit, the permittee shall apply for and obtain a new or reissued permit.

C. Duty to mitigate. The permittee shall take all reasonable steps to minimize or prevent any impacts in violation of the permit which may have a reasonable likelihood of adversely affecting human health or the environment.

D. Inspection and entry. Upon presentation of credentials, the permittee shall allow the board or any duly authorized agent of the board, at reasonable times and under reasonable circumstances, to conduct the actions listed in this section. For the purpose of this section, the time for inspection shall be deemed reasonable during regular business hours. Nothing contained herein shall make an inspection time unreasonable during an emergency.

1. Enter upon permittee's property, public or private, and have access to, inspect and copy any records that must be kept as part of the VWP permit conditions;
2. Inspect any facilities, operations or practices (including monitoring and control equipment) regulated or required under the VWP permit; and
3. Sample or monitor any substance, parameter or activity for the purpose of ensuring compliance with the conditions of the VWP permit or as otherwise authorized by law.

E. Duty to provide information.

1. The permittee shall furnish to the board any information which the board may request to determine whether cause exists for modifying, revoking, reissuing or terminating the VWP permit, or to determine compliance with the VWP permit. The permittee shall also furnish to the board, upon request, copies of records required to be kept by the permittee.
2. Plans, maps, conceptual reports and other relevant information shall be submitted as required by the board prior to commencing construction.

F. Monitoring and records requirements.

1. Monitoring of parameters, other than pollutants, shall be conducted according to approved analytical methods as specified in the VWP permit. Analysis of pollutants will be conducted according to 40 CFR Part 136 (2000), Guidelines Establishing Test Procedures for the Analysis of Pollutants.

2. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.
3. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart or electronic recordings for continuous monitoring instrumentation, copies of all reports required by the VWP permit, and records of all data used to complete the application for the VWP permit, for a period of at least three years from the date of the expiration of a granted VWP permit. This period may be extended by request of the board at any time.
4. Records of monitoring information shall include as appropriate:
  - a. The date, exact place and time of sampling or measurements;
  - b. The name of the individuals who performed the sampling or measurements;
  - c. The date and time the analyses were performed;
  - d. The name of the individuals who performed the analyses;
  - e. The analytical techniques or methods supporting the information such as observations, readings, calculations and bench data used;
  - f. The results of such analyses; and
  - g. Chain of custody documentation.

#### Statutory Authority

§ 62.1-44.15 of the Code of Virginia.

#### Historical Notes

Derived from VR680-15-02 § 2.2, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007.

**9VAC25-210-100. Signatory requirements.**

A. Application. Any application for a VWP permit under this chapter must bear the applicant's signature or the signature of a person acting in the applicant's behalf, with the authority to bind the applicant. Electronic submittals containing the original-signature page, such as that contained in a scanned document file, are acceptable.

B. Reports. All reports required by VWP permits and other information requested by the board shall be signed by:

1. One of the persons described in subsection A of this section; or
2. A duly authorized representative of that person. A person is a duly authorized representative only if:
  - a. The authorization is made in writing by a person described in subsection A of this section; and
  - b. The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, superintendent, or position of equivalent responsibility. A duly authorized representative may thus be either a named individual or any individual occupying a named position.
  - c. If an authorization is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization must be submitted to the board prior to or together with any separate information, or applications to be signed by an authorized representative.

C. Certification of application and reports. Any person signing a document under subsection A or B of this section shall make the following certification: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the

information submitted. Based on my inquiry of the person or persons who manage the system or those persons directly responsible for gathering the information, the information submitted is to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false information including the possibility of fine and imprisonment for knowing violations."

#### Statutory Authority

§ 62.1-44.15 of the Code of Virginia.

#### Historical Notes

Derived from VR680-15-02 § 2.3, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007.

### **9VAC25-210-110. Establishing applicable standards, limitations or other VWP permit conditions.**

In addition to the conditions established in 9VAC25-210-90 and 9VAC25-210-100, for surface water withdrawals in 9VAC25-210-(tbd), each VWP permit shall include conditions meeting the following requirements where applicable:

A. Water quality standards and state requirements. The VWP permit shall include requirements to comply with all appropriate provisions of state laws and regulations.

B. Toxic pollutants.

1. Where the board finds that appropriate limitations may not ensure compliance with the law or state water quality standards the board shall require the permittee to follow a program of biological or chemical toxics monitoring. The requirement may include a VWP permit reopener to allow the imposition of toxicity reduction or elimination measures determined to be necessary as a result of the board's evaluation of the results of the toxic monitoring and other available information. Based upon this determination, appropriate



limitations will be included in the VWP permit to ensure the reduction or elimination of toxic pollutants and allow the board to ensure that the proposed project will comply with water quality standards and other appropriate requirements of the law.

2. Limitations will be included in the VWP permit to control all toxic pollutants which the board determines (based on information reported in a VWP permit application or a notification or on other information) are or may be discharged at a level which would adversely affect the beneficial use of the receiving waters.

C. Monitoring requirements as conditions of VWP permits may include but are not limited to:

1. Requirements concerning the proper use, maintenance and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate) when required as a condition of the VWP permit;
2. Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity and including, when appropriate, continuous monitoring and composite samples;
3. Applicable reporting requirements based upon the impact of the regulated activity on water quality; and
4. Requirements to report monitoring results with a frequency dependent on the nature and effect of the regulated activity.

D. Best Management Practices (BMPs). The VWP permit may require the use of BMPs to control or abate the discharge of pollutants.

E. Reissued VWP permits. When a VWP permit is renewed or reissued, limitations, standards or conditions must be in conformance with current limitations, standards, or conditions.

F. Reopening VWP permits. Each VWP permit shall have a condition allowing the reopening of the VWP permit for the purpose of modifying the conditions of the VWP permit to meet new regulatory standards duly adopted by the board. Cause for reopening VWP permits includes, but is not limited to when the circumstances on which the previous VWP permit was based have materially and substantially changed, or special studies conducted by the board or the permittee show material and substantial change, since the time the VWP permit was issued and thereby constitute cause for VWP permit modification or revocation and reissuance.

#### Statutory Authority

§ 62.1-44.15 of the Code of Virginia.

#### Historical Notes

Derived from VR680-15-02 § 2.4, eff. May 20, 1992; amended, Virginia Register Volume 16, Issue 25, eff. September 27, 2000; Errata, 17:3 VA.R. 433 October 23, 2000; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007.

9VAC25-210-115. (Repealed.) Historical Notes

**Derived from Virginia Register Volume 17, Issue 21, eff. August 1, 2001; amended, Virginia Register Volume 23, Issue 21, eff. July 25, 2007. 9VAC25-210-116. Compensation.**

A. No net loss. Compensatory mitigation for project impacts shall be sufficient to achieve no net loss of existing wetland acreage and no net loss of functions in all surface waters. Compensatory mitigation ratios appropriate for the type of aquatic resource impacted and the type of compensation provided shall be applied to permitted impacts to help meet this requirement. Credit may be given for preservation of upland buffers already protected under other ordinances to the extent that additional protection and water quality and fish and wildlife resource benefits are provided.

B. Practicable and ecologically preferable compensation alternatives.

1. An analysis shall be required to justify that permittee-responsible compensation is ecologically preferable to the purchase of mitigation bank credits or in-lieu fee program credits.
2. Such analysis shall include, but is not limited to, the following criteria, which shall be compared between the impacted and replacement sites: water quality benefits; acreage of impacts; distance from impacts; hydrologic source and regime; watershed; functions and values; vegetation type; soils; constructability; timing of compensation versus impact; property acquisition; and cost. The analysis shall compare the ability of each compensatory mitigation option to replace lost wetland acreage and functions or lost stream functions and water quality benefits.
3. The applicant must demonstrate that permittee-responsible compensation can be protected in perpetuity through a conservation easement held by a third party in accordance with the Virginia Conservation Easement Act, or if approved by DEQ a duly recorded declaration of restrictive covenants. The protection mechanism shall include a long term management plan that identifies a long term steward and adequate financial assurances for long term management in accordance with the current standard for mitigation banks and in-lieu fee fund sites. If approved by DEQ, permittee-responsible compensation on government property and long-term protection may be provided through federal facility management plans, integrated natural resources management plans, or other alternate management plans submitted by a government agency or public authority. In cases where an alternate mechanism of long-term management is submitted for DEQ approval (e.g., a documented commitment from a government agency or public authority), financial assurances will not be necessary for that permittee-responsible compensation on government property. The protective instrument mechanism shall be recorded in the chain of title to the property, or an equivalent instrument for government-

owned lands. Proof of recordation shall be submitted within 120 days of final compensation plan approval.

C. Compensatory mitigation proposals shall be evaluated as follows: *[subsection revised since 9/22/14 CAG meeting]*

1. The purchase of mitigation bank credits and in-lieu fee ~~program~~ credits, when available, shall be deemed the ecologically preferable form of compensation for project impacts, in most cases. However, permittee-responsible compensation opportunities may be considered when the applicant demonstrates satisfactorily that permittee-responsible compensation, in accordance with subsection B 2 of this section, is ecologically preferable.

2. Compensatory mitigation for unavoidable wetland impacts may be met through the following options, which are generally preferred in the following sequence: mitigation banking, in-lieu fee ~~program~~, and permittee-responsible compensation. However, the appropriate compensatory mitigation option for project impacts shall be evaluated on a case-by-case basis, in terms of replacement of wetland acreage and functions. When considering options for providing the required compensatory mitigation, DEQ shall consider the type and location options in the following order:

- a. ~~Purchase or use of wetland credits from a mitigation bank, or released wetland credits from a DEQ approved in-lieu fee fund, pursuant to § 62.1-44.15:23 of the Code of Virginia~~mitigation bank credits;
- b. ~~Purchase of advance wetland credits from an approved in-lieu fee fund~~in-lieu fee program credits;
- c. permittee-responsible ~~compensation using~~mitigation under a watershed approach;
- d. permittee-responsible ~~compensation~~ (mitigation through onsite and in-kind ~~compensatory mitigation~~);

e. permittee-responsible ~~compensation~~ (mitigation through off-site or out-of-kind) mitigation;

f. restoration of upland buffers adjacent to wetlands, when utilized in conjunction with subdivision 2 a, b, c, d, or e of this subsection and when consistent with 9VAC25-210-116 A;

g. preservation of wetlands, when utilized in conjunction with subdivision 2 a, b, c, d, or e of this subsection and when consistent with 9VAC25-210-116 A;

h. preservation of upland buffers adjacent to wetlands, when utilized in conjunction with subdivision 2 a, b, c, d, or e of this subsection and when consistent with 9VAC25-210-116 A.

3. Compensatory mitigation for unavoidable stream impacts may be met through the following options, which are generally preferred in the following sequence: mitigation banking, in-lieu fee ~~program~~, and permittee-responsible compensation. However, the appropriate compensatory mitigation option for project impacts shall be evaluated on a case-by-case basis, in terms of replacement of stream functions and water quality benefits. One factor in determining the required compensation shall be an analysis of stream impacts utilizing a stream impact assessment methodology approved by the board. When considering options for providing the required compensatory mitigation, DEQ shall consider the type and location options in the following order:

a. ~~Purchase or use of stream credits from a mitigation bank or released stream credits from a DEQ-approved in-lieu fee fund, pursuant to § 62.1-44.15:23 of the Code of Virginia~~ mitigation bank stream credits;

b. ~~Purchase of advance stream credits from an approved in-lieu fee fund~~ in-lieu fee program credits;

c. permittee-responsible ~~compensation using~~ mitigation under a watershed approach;

d. permittee-responsible ~~compensation~~ (mitigation through onsite and in-kind ~~compensatory~~ mitigation); e. permittee-responsible ~~compensation~~ (mitigation through off-site or out-of-kind) mitigation;

f. restoration of upland buffers adjacent to streams, when utilized in conjunction with subdivision 3 a, b, c, d, or e of this subsection and when consistent with 9VAC25-210-116 A;

g. preservation of stream channels and adjacent riparian buffers, when utilized in conjunction with subdivision 3 a, b, c, d, or e of this subsection, and when consistent with 9VAC25-210-116 A.

D. In-lieu fee fund approval.

1. In order for contribution to an in-lieu fee fund to be an acceptable form of compensatory mitigation, the fund must be approved for use by the board and must be dedicated to the achievement of no net loss of wetland acreage and functions or stream functions and water quality benefits through the preservation, restoration and creation of wetlands or streams.

2. The board may approve the use of a fund by:

- a. Approving use of a fund for a specific project when approving a VWP permit; or
- b. Approving the fund's Instrument.

3. In order for the board to approve the use of a fund, the fund must meet the following criteria:

- a. Demonstration of a no net loss policy in terms of wetland acreage and functions or stream functions and water quality benefits by adoption of operational goals or objectives for preservation, creation or restoration;

- b. DEQ approval of each site for inclusion in the fund;
  - c. A commitment to provide annual reports to the board detailing contributions received and acreage and type of wetlands or streams preserved, created or restored in each watershed with those contributions, as well as the compensatory mitigation credits contributed for each watershed of project impact;
  - d. A mechanism to establish fee amounts that will ensure each contribution will be adequate to compensate for the wetland acreage and functions or stream functions and water quality benefits lost in the impacted watershed; and
  - e. Such terms and conditions as the board deems necessary to ensure a no net loss of wetland acreage and functions or stream functions and water quality benefits from permitted projects providing compensatory mitigation through contributions to the fund.
4. Such approval may be granted for up to 10 years and may be renewed by the board upon a demonstration that the fund has enhanced wetland acreage or functions or stream functions and water quality benefits through the restoration, creation, enhancement, or preservation of wetlands and their associated buffers and enhanced stream functions and water quality benefits through the restoration, enhancement, or preservation of streams and their associated buffers. Such demonstration may be made with the reports submitted pursuant to subdivision 3 c of this subsection.
5. The board may approve the use of an in-lieu fee fund instrument only after publishing a notice of its intent in the Virginia Register of Regulations at least 45 days prior to taking such action and after accepting and considering public comments on its approval of the fund for at least a 30-day period. Where approval is contemplated in accordance with subdivision 2 a of this subsection, compliance with the public notice and comment requirements for approval of the VWP permit shall meet this requirement.

E. Use of mitigation banks and multi-project mitigation sites. For compensating project impacts, use of mitigation banks or, where applicable, multi-project mitigation sites shall be deemed appropriate if the following criteria are met:

1. The bank or multi-project mitigation site meets the criteria and conditions found in § 62.1-44.15:23 of the Code of Virginia;
2. For mitigation banks only, the banking instrument, if approved after July 1, 1996, has been approved by a process that involved public review and comment in accordance with federal guidelines;
3. The applicant provides verification to DEQ of purchase of the required amount of credits prior to taking the permitted impacts; and
4. For multi-project compensatory mitigation sites established after January 1, 2008[July 24, 2007], the VWP permit shall include conditions sufficient to ensure long term monitoring and maintenance of surface water functions [?],[and if established after the effective date of this permit regulation, shall also include] including a long term management plan with an identified long term steward and adequate financial assurances for long term management in accordance with the current standard for mitigation banks and in-lieu fee fund sites.

F. For permittee-responsible compensation the final compensatory mitigation plan must include complete information on all components of the conceptual compensatory mitigation plan detailed in 9VAC25-210-80 B 1 m:

1. For wetlands, the final compensation plan shall also include a summary of the type and acreage of existing wetland impacts anticipated during the construction of the compensation site and the proposed compensation for these impacts; a site access plan; a monitoring plan, including proposed success criteria, monitoring goals, and the location



of photostations, monitoring wells, vegetation sampling points, and reference wetlands or streams (if available); an abatement and control plan for undesirable plant species; an erosion and sedimentation control plan; a construction schedule; and the mechanism for protection of the compensation site or sites, including all surface waters and buffer areas within its boundaries. The final wetland compensation plan or plans shall include a mechanism for protection in perpetuity of the compensation sites in accordance with subsection B 3 of this section.

2. For streams, the final compensation plan shall also include a site access plan; an erosion and sedimentation control plan, if appropriate; an abatement and control plan for undesirable plant species; a monitoring plan, including, a monitoring and reporting schedule, monitoring design and methodologies for success; proposed success criteria; and location of photo-monitoring stations, vegetation sampling points, survey points, bank pins, scour chains, and reference streams; the mechanism for the protection of the compensation site or sites, including all surface waters and buffer areas within its boundaries; a plan view sketch depicting the pattern and all compensation measures being employed; a profile sketch; and cross-sectional sketches of the proposed compensation stream. The final stream compensation plan or plans shall include a mechanism for protection in perpetuity of the compensation sites in accordance with subsection B 3 of this section.

#### Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act.

#### Historical Notes

Derived from Virginia Register Volume 23, Issue 21, eff. July 25, 2007; amended, Virginia Register Volume 24, Issue 9, eff. February 6, 2008.

**9VAC25-210-120. Draft VWP permit formulation.**

A. After evaluation of a complete application, the board shall make a decision to tentatively issue or deny the VWP permit pursuant to this section.

B. If the tentative decision is to issue the VWP permit then a draft VWP permit shall be prepared in advance of public notice. The following tentative determinations shall be incorporated into a draft VWP permit:

1. Conditions, discharge limitations, standards and other requirements applicable to the VWP permit;
2. Monitoring requirements; and
3. Requirements for mitigation of adverse environmental impacts.

C. If the tentative decision is to deny the application, the board shall do so in accordance with 9VAC25-210-230.

D. Should a decision be made to waive the requirement for a VWP permit, the board shall do so in accordance with 9VAC25-210-220.

**Statutory Authority**

§ 62.1-44.15 of the Code of Virginia.

**Historical Notes**

Derived from VR680-15-02 § 2.5, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001.

**9VAC25-210-130. VWP general permits.**

A. The board may issue VWP general permits by regulation for certain specified categories of activities as it deems appropriate.

B. When the board determines on a case-by-case basis that concerns for water quality and the aquatic environment so indicate, the board may require individual applications and VWP

individual permits rather than approving coverage under a VWP general permit regulation. Cases where an individual VWP permit may be required include the following:

1. Where the activity may be a significant contributor to pollution;
2. Where the applicant or permittee is not in compliance with the conditions of the VWP general permit regulation or authorization;
3. When an applicant or permittee no longer qualifies for coverage under the VWP general permit regulation or authorization; and
4. When a permittee operating under a VWP general permit authorization requests to be excluded from the coverage of the VWP general permit regulation by applying for a VWP individual permit.

C. When a VWP individual permit is issued to a permittee, the applicability of the VWP general permit authorization to the individual permittee is automatically terminated on the effective date of the VWP individual permit.

D. When a VWP general permit regulation is issued which applies to a permittee that is already covered by a VWP individual permit, such person may request exclusion from the provisions of the VWP general permit regulation and subsequent coverage under a VWP individual permit.

E. A VWP general permit authorization may be revoked from an individual permittee for any of the reasons set forth in 9VAC25-210-180 subject to appropriate opportunity for a hearing.

F. When all permitted activities requiring notification have been completed, the permittee shall be required to submit a notice of termination unless the permittee has previously submitted a termination by consent request for the same permitted activities and such request has been approved by the board.

G. Activities authorized under a VWP general permit regulation shall be authorized for the fixed term stated in the applicable VWP general permit, unless otherwise continued [or extended] by the board in accordance with the provisions contained in the applicable VWP general permit regulation.

H. The board may certify or certify with conditions a general, regional, or nationwide permit proposed by the USACE in accordance with § 401 of the federal Clean Water Act as meeting the requirements of this regulation and a VWP general permit, provided that the nationwide or regional permit and the certification conditions:

1. Require that wetland or stream impacts be avoided and minimized to the maximum extent practicable;
2. Prohibit impacts that cause or contribute to a significant impairment of state waters or fish and wildlife resources;
3. Require compensatory mitigation sufficient to achieve no net loss of existing wetland acreage and functions or stream functions and water quality benefits; and
4. Require that compensatory mitigation for unavoidable wetland impacts be provided in accordance with 9VAC25-210-116 [C.2].
5. Require that compensatory mitigation for unavoidable stream impacts be provided in accordance with 9VAC25-210-116 [C.3], including but not limited to an analysis of stream impacts utilizing a stream impact assessment methodology approved by the board.

I. The certifications allowed by subsection H of this section may be provided only after the board has advertised and accepted public comment on its intent to provide certification for at least 30 days.

J. Coverage under a general, regional, or nationwide permit promulgated by the USACE and certified by the board in accordance with this section shall be deemed coverage under a VWP general permit regulation upon submission of proof of coverage under the general, regional, or

nationwide permit and any other information required by the board through the certification process. Notwithstanding the provisions of 9VAC25-20-10, no fee shall be required from applicants seeking coverage under this subsection.

#### Statutory Authority

§ 62.1-44.15 of the Code of Virginia; § 401 of the Clean Water Act.

#### Historical Notes

Derived from VR680-15-02 § 2.6, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 24, Issue 9, eff. February 6, 2008; Volume 25, Issue 5, eff. December 10, 2008; Errata, 25:9 VA.R. 1826 January 5, 2009.

### Part III

#### Public Involvement

#### **9VAC25-210-140. Public notice of VWP permit actions and public comment periods.**

A. Every draft VWP permit, with the exception of an Emergency Virginia Water Protection Permit, shall be given public notice paid for by the applicant, by publication once in a newspaper of general circulation in the area affected by the proposed activity. The public notice must be published within 14 days of the applicant's receipt of a draft VWP permit, or the 120-day VWP permit processing timeframe will be suspended until such publication.

B. The board shall provide a comment period of at least 30 days following the date of the public notice for interested persons to submit written comments on the tentative decision and to request a public hearing on the VWP permit. All written comments submitted during the comment period shall be retained by the board and considered during its final decision on the VWP permit.

C. The contents of the public notice for a VWP permit application or proposed VWP permit action shall include:

1. Name and mailing address of the applicant;
2. The permit application number;
3. Project location. If the location of the activity differs from the address of the applicant the notice shall also state the location in sufficient detail such that the specific location may be easily identified;
4. Brief description of the business or activity to be conducted at the site of the proposed activity;
5. Description of the area affected. Information on the number of acres of wetlands and/or the number of linear feet of streams affected, as well as the name of the receiving waterway and the name of the affected watershed should be included;
6. Description of what the applicant plans to do to compensate for the affected area;
7. A statement of the tentative determination to issue or deny a VWP permit;
8. A brief description of the final determination procedure;
9. The address, e-mail address and phone number of a specific person or persons at the state office from whom further information may be obtained; and
10. A brief description on how to submit comments and request a public hearing.

D. Public notice shall not be required for submission or approval of plans and specifications or conceptual engineering reports not required to be submitted as part of the application.

E. When a VWP permit is denied, the board shall do so in accordance with 9VAC25-210-230.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia.

#### Historical Notes

Derived from VR680-15-02 § 3.1, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007.

#### **9VAC25-210-150. Public access to information.**

All information pertaining to VWP permit processing or in reference to any activity requiring a VWP permit under this chapter shall be available to the public, unless the applicant has made a showing that the information is protected by the applicant as a trade secret covered by § 62.1-44.21 of the Code of Virginia. All information claimed confidential must be identified as such at the time of submission to the board and VMRC.

#### Statutory Authority

§ 62.1-44.15 of the Code of Virginia.

#### Historical Notes

Derived from VR680-15-02 § 3.2, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001.

#### **9VAC25-210-160. Public comments and hearing.**

A. The board shall consider all written comments and requests for a public hearing received during the comment period, and shall make a determination on the necessity of a public hearing in accordance with § 62.1-44.15:2 of the Code of Virginia. All proceedings, public hearings and decisions from it will be in accordance with § 62.1-44.15:2 of the Code of Virginia.

B. Should the board, in accordance with § 62.1-44.15:2 of the Code of Virginia, determine to dispense with the public hearing, it may grant the VWP permit, or, at its discretion, transmit the application or request, together with all written comments from it and relevant staff documents and staff recommendations, if any, to the board for its decision.

C. Any applicant or permittee aggrieved by an action of the board taken without a public hearing, or inaction of the board, may request in writing a hearing pursuant to § 62.1-44.15:2 of the Code of Virginia.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia.

Historical Notes

Derived from VR680-15-02 § 3.3, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001.

**9VAC25-210-170. Public notice of hearing.**

A. Public notice of any public hearing held pursuant to 9VAC25-210-160 shall be circulated as follows:

1. Notice shall be published once in a newspaper of general circulation in the county or city where the activity is to occur; and
2. Notice of the public hearing shall be sent to all persons and government agencies that received a copy of the notice of VWP permit application and to those persons requesting a public hearing or having commented in response to the public notice.

B. Notice shall be effected pursuant to subdivisions A 1 and 2 of this section at least 30 days in advance of the public hearing.

C. The content of the public notice of any public hearing held pursuant to 9VAC25-210-160 shall include at least the following:

1. Name and mailing address of each person whose application will be considered at the public hearing and a brief description of the person's activities or operations including information on the number of acres of wetlands and/or the number of linear feet of streams affected, a description of the nature of the withdrawal and the amount of the



withdrawal; as well as the name of the receiving waterway and the name of the affected watershed;

2. The precise location of the proposed activity and the surface waters that will, or may, be affected including, where possible, reference to route numbers, road intersections, map coordinates or similar information;

3. Description of what the applicant plans to do to compensate for the affected area;

4. A brief reference to the public notice issued for the VWP permit application or permit action, including the permit application number and date of issuance, unless the public notice includes the public hearing notice;

5. Information regarding the time and location for the public hearing;

6. The purpose of the public hearing;

7. A concise statement of the relevant water quality, or fish and wildlife resource issues raised by the persons requesting the public hearing;

8. Contact person and the mailing address, e-mail address, name of the DEQ regional office and phone number of the DEQ office at which the interested persons may obtain further information or request a copy of the draft VWP permit prepared pursuant to 9VAC25-210-120; and

9. A brief reference to the rules and procedures to be followed at the public hearing.

D. Public notice of any public hearing held pursuant to 9VAC25-210-160 C shall be in accordance with § 62.1-44.15:2 of the Code of Virginia.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia.

Historical Notes

Derived from VR680-15-02 § 3.1, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007.

#### Part IV

VWP Permit Modification, Revocation and Reissuance, Transfer, Termination and Denial

#### **9VAC25-210-175. (Repealed.)**

#### Historical Notes

Derived from Virginia Register Volume 23, Issue 21, eff. July 25, 2007.

#### **9VAC25-210-180. Rules for modification, revocation and reissuance, extension, transfer, and termination of VWP individual permits.**

A. VWP individual permits may be modified in whole or in part, revoked and reissued, extended, or transferred or terminated only as authorized by this section.

B. VWP permits may be modified upon the request of the permittee or upon board initiative when any of the following developments occur.

1. When new information becomes available about the project or activity covered by the VWP permit, including project additions or alterations, that was not available at VWP permit issuance and would have justified the application of different VWP permit conditions at the time of VWP permit issuance;
2. When a change is made in the promulgated standards or regulations on which the VWP permit was based;
3. When changes occur that are subject to "reopener clauses" in the VWP permit.
4. Developments applicable to surface water withdrawals as specified in 9VAC25-210-(tbd).

C. A request for a modification, except those addressed in 9VAC25-210-180 [E], shall include the applicable informational requirements of 9VAC25-210-80 [B] through submittal of the updated portions of the application that reflect the proposed changes to the project. The board may request additional information as necessary to review and prepare a draft permit. If the board tentatively decides to modify a permit, it shall prepare a draft permit incorporating the proposed changes in accordance with 9VAC25-210-120 and process the draft permit in accordance with 9VAC25-210-140, 9VAC25-210-150, 9VAC25-210-160, and 9VAC25-210-170 [C].

D. During the drafting and authorization of a permit modification under this section, only those conditions to be modified shall be addressed when preparing a draft modified permit. VWP permit terms and conditions of the existing permit shall remain in full force and effect during the modification of the permit.

E. Upon request of the permittee, or upon board initiative with the consent of the permittee, minor modifications may be made in the VWP permit without following the public involvement procedures contained in 9VAC25-210-140, 9VAC25-210-160, or 9VAC25-210-170. For VWP permits, a minor modification may only be processed to:

1. Correct typographical errors.
2. Require monitoring and reporting by the permittee at a different frequency than required in the VWP permit, based on new information justifying the change in conditions.
3. Change a compliance date provided it will not result in a net loss of wetland acreage, or values functions in all surface waters.
4. Allow for a change in permittee provided that a written agreement containing a specific date for transfer of VWP permit responsibility, authorization, and liability from the current to the new permittee has been submitted to the board. A VWP permit shall be transferred only if the VWP permit has been modified to reflect the transfer, has been revoked and reissued to the new permittee, or has been automatically transferred. Any individual VWP permit shall be automatically transferred to a new permittee if the current permittee:
  - a. Notifies the board of the proposed transfer of the permit and provides a written agreement between the existing and proposed permittees containing the date of transfer of VWP permit responsibility, authorization, and liability to the new permittee; and
  - b. The board does not within 15 days notify the existing permittee and the new permittee of its intent to modify the VWP permit.
5. Change project plans that do not result in a change to permitted project impacts other than allowable by 9VAC25-210-180 [E 6] and 9VAC25-210-180 [E 7].
6. Reduce wetland or stream impacts. Compensation requirements may be modified in relation to the adjusted impacts, provided that the adjusted compensation

meets the initial compensation goals. DEQ shall not be responsible for ensuring refunds for mitigation bank credit purchases, mitigation bank usage, or in-lieu fee fund credit purchases.

7. Authorize additional impacts to surface waters that are proposed prior to impacting those additional areas. The board, at its discretion, may require that the proposal for additional permanent or temporary impacts be processed as a modification in accordance with 9VAC25-180 [B]. Proposed additional impacts shall meet the following requirements:

- a. Proposed impacts are located within the project boundary as depicted in the original application.

- b. The cumulative, additional permanent wetland or open water impacts for one or more minor modifications do not exceed the greater of either: i) ~~equal to or less than one-tenth of the acreage, not to exceed 1.0 acre, of originally permitted permanent wetland or open water impacts;~~ 0.25 acre or ii) ~~0.25 acre of permanent wetland or open water impacts~~ 10% of the acre(s) of originally permitted permanent wetland or open water impacts, not to exceed 1.00 acre.

- c. The cumulative, additional permanent stream impacts for one or more minor modifications do not exceed the greater of either: i) ~~equal to or less than one-tenth of the linear feet, not to exceed 1,500 linear feet, of originally permitted permanent stream impacts;~~ 100 linear feet or ii) ~~100 linear feet of permanent stream impacts~~ 10% of the linear feet of originally permitted permanent stream impacts,, not to exceed 1,500 linear feet.

- d. Documentation is provided demonstrating that the proposed surface water impacts have been avoided to the maximum extent practicable in accordance with the informational requirements of 9VAC25-80 [B 1 g].

e. Compensation for the proposed impacts meets the requirements of 9VAC25-80 [B 1 h] and 9VAC25-210-116.

f. Where such additional impacts are temporary, and prior to initiating the impacts, the permittee provides a written statement to the board information that demonstrates the additional impacts are of minimal ecological impact and that the functions and values of area to be temporarily impacted will be restored to its preconstruction contours and elevations, such that previous acreage and functions are restored. When temporary impacts are the only proposed change to the permitted project, a minor modification is not required subsequent to issuance provided the criteria in this subsection [of Section E 7] are met and DEQ's written approval is received prior to initiating the proposed temporary impacts. The proposed temporary impacts shall be deemed approved if DEQ does not respond within 15 days of receipt of the request for authorization to temporarily impact additional surface waters. The board, at its discretion, may require the proposal for additional temporary impacts be processed as a modification in accordance with 9VAC25-180 [B] if the proposed impacts may result in more than a minimal ecological impact.

8. Substitute a specific, approved mitigation bank(s) with another approved mitigation bank for all or a portion of the prior authorized permittee-responsible compensation with a purchase of mitigation credits in accordance with 9VAC25-210-116 [C 2] from an approved mitigation bank(s) or a DEQ-approved in-lieu fee fund. The amount of credits proposed to be purchased shall be sufficient to meet the compensation requirement for which the compensation is proposed to replace.
9. Allow for extension of the expiration date of the VWP permit. Any permittee with an effective VWP permit for an activity that is expected to continue after the expiration date

of the VWP permit, without any change in the activity authorized by the VWP permit other than as may be allowed under this section, shall submit written notification requesting an extension. The permittee must file the request 180 days prior to the expiration date of the VWP permit. VWP permit modifications shall not be used to extend the term of a VWP permit beyond 15 years from the date of original issuance.

10. Activities or developments applicable to surface water withdrawals as specified in 9VAC25-210-(tbd).

G. After notice and opportunity for a formal hearing pursuant to § 62.1-44.15:2 of the Code of Virginia, a VWP permit can be terminated for cause. Reasons for termination for cause are as follows:

1. Noncompliance by the permittee with any condition of the VWP permit;
2. The permittee's failure in the application or during the VWP permit issuance process to disclose fully all relevant facts or the permittee's misrepresentation of any relevant facts at any time;
3. The permittee's violation of a special or judicial order;
4. A determination by the board that the permitted activity endangers human health or the environment and can be regulated to acceptable levels by VWP permit modification or termination;
5. A change in any condition that requires either a temporary or permanent reduction or elimination of any activity controlled by the VWP permit; and

6. A determination that the permitted activity has ceased and that the compensatory mitigation for unavoidable adverse impacts has been successfully completed. H. The board may terminate the permit without cause when the permittee is no longer a legal entity due to death, dissolution, or when a company is no longer authorized to conduct business in the Commonwealth. The automatic termination shall be effective 30 days after notice of the

proposed termination is sent to the last known address of the permittee or registered agent, unless the permittee objects within that time. If the permittee does object during that period, the board shall follow the applicable procedures for termination under § 62.1-44.15:2 of the Code of Virginia as referenced above.

I. A VWP permit can be terminated by consent, as initiated by the permittee, when all permitted activities have been completed or if the authorized impacts will not occur. The permittee shall submit a request for termination by consent within 30 days of project completion or project cancellation. The director may accept this termination on behalf of the board. The permittee shall submit the following information:

1. Name, mailing address and telephone number;
2. Name and location of the activity;
3. The VWP permit authorization number; and
4. One of the following certifications:
  - a. For project completion: "I certify under penalty of law that all activities and any requested compensatory mitigation authorized by a VWP permit have been completed. I understand that by submitting this notice of termination that I am no longer authorized to perform activities in surface waters in accordance with the VWP permit, and that performing activities in surface waters is unlawful where the activity is not authorized by a VWP permit. I also understand that the submittal of this notice does not release me from liability for any violations of this VWP permit."
  - b. For project cancellation: "I certify under penalty of law that the activities and any required compensatory mitigation authorized by this VWP permit will not occur. I understand that by submitting this notice of termination, that I am no longer authorized to perform activities in surface waters in accordance with the VWP permit, and that performing activities in surface waters is unlawful where the activity is not authorized



by a VWP permit. I also understand that the submittal of this notice does not release me from liability for any violations of this VWP permit, nor does it allow me to resume the permitted activities without reapplication and issuance of another permit."

c. For events beyond permittee control, the permittee shall provide a detailed explanation of the events, to be approved by DEQ, and the following certification statement: "I certify under penalty of law that the activities or the required compensatory mitigation authorized by a VWP permit have changed as the result of events beyond my control (see attached). I understand that by submitting this notice of termination I am no longer authorized to perform activities in surface waters in accordance with the VWP permit, and that performing activities in surface waters is unlawful where the activity is not authorized by a VWP permit. I also understand that the submittal of this notice does not release me from liability for any violations of this VWP permit, nor does it allow me to resume the permitted activities without reapplication and issuance of another permit.

J. If a permittee files a request for VWP permit modification, revocation and reissuance, or termination, or files a notice of planned changes or anticipated noncompliance, the VWP permit terms and conditions shall remain effective until the request is acted upon by the board.

#### Statutory Authority

§ 62.1-44.15 of the Code of Virginia.

#### Historical Notes

Derived from VR680-15-02 § 4.1, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007.

#### **9VAC25-210-185. Duration of VWP permits.**

A. Duration of VWP permits. VWP permits issued under this chapter shall have an effective date and expiration date that will determine the life of the permit. VWP permits shall be effective

for a fixed term based upon the projected duration of the project, the length of any required monitoring, or other project operations or VWP permit conditions; however, the term shall not exceed 15 years and will be specified in the conditions of the VWP permit. Emergency Virginia Water Protection Permits shall not exceed a duration of one year or shall expire upon the issuance of a regular Virginia Water Protection Permit, whichever comes first.

#### Statutory Authority

§ 62.1-44.15 of the Code of Virginia.

#### Historical Notes

Derived from Virginia Register Volume 17, Issue 21, eff. August 1, 2001; amended, Virginia Register Volume 23, Issue 21, eff. July 25, 2007.

#### **9VAC25-210-190. (Repealed.)**

#### Historical Notes

Derived from VR680-15-02 § 4.2, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; repealed, Virginia Register Volume 23, Issue 21, eff. July 27, 2007.

#### **9VAC25-210-200. (Repealed.)**

#### Historical Notes

Derived from VR680-15-02 § 4.3, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; repealed, Virginia Register Volume 23, Issue 21, eff. July 25, 2007.

#### **9VAC25-210-210. (Repealed.)**

#### Historical Notes

Derived from VR680-15-02 § 4.4, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; repealed, Virginia Register Volume 23, Issue 21, eff. July 25, 2007.

**9VAC25-210-220. Waiver of VWP permit or § 401 certification.**

A. The board may waive permitting requirements when the board determines that a proposed project impacts an isolated wetland that is of minimal ecological value as defined in 9VAC25-210-10. Any person claiming this waiver bears the burden to demonstrate that he qualifies for the waiver.

B. The board may waive the requirement for a VWP individual permit when the proposed activity qualifies for a permit issued by the USACE and receives a permit from the VMRC or wetlands boards, pursuant to Chapter 12 (§ 28.2-1200 et seq.) or Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 of the Code of Virginia, and the activity does not impact instream flows.

C. The board shall waive the requirement for a VWP general permit authorization or VWP individual permit when the proposed activity meets the exclusion set forth in 9VAC25-210-60 A 10 a regardless of the issuance of an individual permit by the United States Army Corps of Engineers.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia.

Historical Notes

Derived from VR680-15-02 § 4.5, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007; Volume 25, Issue 5, eff. December 10, 2008.

**9VAC25-210-230. Denial of the VWP permit or variance request.**

A. The board shall make a decision to tentatively deny the VWP permit or variance request if the requirements of this chapter are not met. Basis for denial include, but are not limited to, the following:

1. The project will result in violations of water quality standards or will impair the beneficial uses of state waters.
2. As a result of project implementation, shellfish waters would be condemned in accordance with 9VAC25-260.
3. The project that the applicant proposed fails to adequately avoid and minimize impacts to state waters to the maximum extent practicable.
4. The proposed compensatory mitigation plan is insufficient or unsatisfactory for the proposed impacts and fails to achieve no net loss of existing wetland acreage and function and no net loss of functions in all surface waters.
5. The Department of Game and Inland Fisheries indicates that natural or stockable trout waters would be permanently and negatively impacted by the proposed activity.
6. The proposed activity is prohibited by 9VAC25-210-50.
7. The effect of project impacts, together with other existing or proposed impacts to wetlands, will cause or contribute to a significant impairment of state waters or fish and wildlife resources.
8. Failure to submit the required permit fee in accordance with 9VAC25-210-80 B 1 n, C 9 or D 1 g.
9. The board determines that the applicant for an Emergency Virginia Water Protection Permit has not demonstrated that there is a substantial threat to public health and safety,

and that normal Virginia Water Protection Permit procedures, including public comment provisions, should be followed.

B. The applicant shall be notified by letter of the board's preliminary decision to tentatively deny the VWP permit requested.

C. Should the applicant withdraw his application, no VWP permit or variance will be issued.

D. Should the applicant elect to proceed as originally proposed, the board may deny the application and advise the applicant pursuant to § 62.1-44.15:2 of the Code of Virginia of his right to a public hearing to consider the denial.

#### Statutory Authority

§ 62.1-44.15 of the Code of Virginia.

#### Historical Notes

Derived from VR680-15-02 § 4.6, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007.

#### 9VAC25-210-240. (Repealed.)Historical Notes

Derived from VR680-15-02 § 5.1, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001.

#### 9VAC25-210-250. (Repealed.)Historical Notes

Derived from VR680-15-02 § 6.1, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001.

#### 9VAC25-210-260. (Repealed.)Historical Notes

Derived from VR680-15-02 § 6.2, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007.

## Part V

## Surface Water Withdrawals

**9VAC25-210-300 - Definitions for Surface Water Withdrawals**

**9VAC25-210-310 - Exclusions from Permits for Surface Water Withdrawals**

**9VAC25-210-320 - Pre-Application Procedures for New or Expanded Surface Water Withdrawals**

**9VAC25-210-330 - Coordinated Review with the Virginia Marine Resource Commission on Applications for Surface Water Withdrawals**

**9VAC25-210-340 - Application Requirements for Surface Water Withdrawals**

**9VAC25-210-350 - Duty to Reapply for a Permit for a Continuation of a Surface Water Withdrawal**

**9VAC25-210-360 - Evaluation of Project Alternatives for Surface Water Withdrawals**

**9VAC25-210-370 - VWP permit Conditions Applicable to Surface Water Withdrawal Permits**

**9VAC25-210-380 - Modifications to Surface Water Withdrawal Permits**

**9VAC25-210-390 - Variance from Surface Water Withdrawal Permit Conditions**

## Part VI

## Enforcement

**9VAC25-210-500. Enforcement.**

The board may enforce the provisions of this chapter utilizing all applicable procedures under the law and § 10.1-1186 of the Code of Virginia.

Statutory Authority

§ 62.1-44.15 of the Code of Virginia.

Historical Notes

Derived from VR680-15-02 § 5.1, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001.

## Part VII

### Miscellaneous

#### **9VAC25-210-600. Delegation of authority.**

The director, or a designee acting for him, may perform any act of the board provided under this chapter, except as limited by § 62.1-44.14 of the Code of Virginia.

#### Statutory Authority

§ 62.1-44.15 of the Code of Virginia.

#### Historical Notes

Derived from VR680-15-02 § 6.1, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001.

#### **9VAC25-210-610. Transition.**

A. All applications received on or after [effective date of regulation], will be processed in accordance with these new procedures.

B. VWP individual permits issued prior to [effective date of regulation], will remain in full force and effect until such permits expire, are revoked, or are terminated, and during any period of administrative continuance in accordance with Section [65] of this regulation.

C. Section 401 Water Quality Certificates issued prior to December 31, 1989, have the same effect as a VWP permit. Water Quality Certificates issued after this date will remain in effect until reissued as Virginia Water Protection Permits.

#### Statutory Authority

§ 62.1-44.15 of the Code of Virginia.

#### Historical Notes

Derived from VR680-15-02 § 6.2, eff. May 20, 1992; amended, Virginia Register Volume 17, Issue 21, eff. August 1, 2001; Volume 23, Issue 21, eff. July 25, 2007.

#### **FORMS (9VAC25-210)**

Permit Application Fee Form (eff. 7/04).

Standard Joint Permit Application for Activities in Waters and Wetlands of the Commonwealth of Virginia (eff. 03/14).

Joint Permit Application for Projects in Tidewater Virginia (eff. 03/14).

Virginia Department of Transportation, Joint Permit Application, IACM Coordination Form (eff. 6/08).

Monthly Reporting of Impacts Less than One-Tenth Acre Statewide (eff. 8/07).

DEQ Application for New or Expanded Minor Surface Water Withdrawals Initiated On or After July 25, 2007.

#### **DOCUMENTS INCORPORATED BY REFERENCE (9VAC25-210)**

Virginia Stormwater Management Handbook, First Edition, 1999, Volume I, Chapter 3, Department of Conservation and Recreation.

Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1, January 1987, Final Report.

Corps of Engineers Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Eastern Mountains and Piedmont Region (Version 2.0), April 2012.

Corps of Engineers Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0), November 2010.

Forestry Best Management Practices for Water Quality in Virginia Technical Guide, Fourth Edition, 2002, Department of Forestry.



Virginia Agricultural Best Management Practices (BMP) Manual, Revised June 2000, Department of Conservation and Recreation.

Virginia Erosion and Sediment Control Handbook, Third Edition, 1992, Department of Conservation and Recreation.

Guideline for Specification of Disposal Sites for Dredged of Fill Material, 40 CFR Part 230 (Federal Register December 24, 1980).

Potomac River Low Flow Allocation Agreement, January 11, 1978, § 181 of the Water Resources Development Act of 1976, Public Law 94-587, as modified on April 22, 1986.

Water Supply Coordination Agreement, July 22, 1982, an attachment to the Drought-Related Operations Manual for the Washington Metropolitan Area Water Suppliers.